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FILED IN THE
UNITED STATES DISTRICT COURT
DISTRICT OF HAWAII
SEP 18 2007
at 9 o'clock and 18 min. P.M.
SUE REINA, CLERK

THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF HAWAII

UNITED STATES OF AMERICA,

Plaintiff,

v.

JAMES CAMPBELL COMPANY LLC,

Defendant.

CIVIL ACTION NO. EV 07-00308-SOM-LEK

CONSENT DECREE

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I. Background

A. The United States of America ("United States"), on behalf of the Administrator of the United States Environmental Protection Agency ("EPA"), filed a complaint in this matter pursuant to Section 107 of the Comprehensive Environmental Response, Compensation, and Liability Act ("CERCLA"), as amended by the Superfund Amendments and Reauthorization Act of 1986, 42 U.S.C. § 9607.

13. The United States in its complaint seeks to require defendant James Campbell Company LLC ("JCCLLC"), as the court approved successor to the Estate of James Campbell ("Estate" as defined below), to implement Institutional Controls (as defined below) at the Del Monte Fresh Produce (Hawaii), Inc., Superfund Site ("Site") located in Oahu, Hawaii.

C In accordance with the National Contingency Plan ("NCP") and Section 121(f)(1)(F) of CERCLA, 42 U.S.C. § 9621(f)(1)(F), EPA notified the State of Hawaii ("State") of negotiations with the Estate regarding the implementation of Institutional Controls for the Site, and EPA has provided the State with an opportunity to participate in such negotiations and be a party to this Consent Decree.

D. In accordance with Section 122(j)(1) of CERCLA, 42 U.S.C. § 9622(j)(1), EPA notified the United States Department of the Interior of negotiations with potentially responsible parties regarding the release of hazardous substances that may have resulted in injury to the natural resources under federal trusteeship and encouraged the trustee(s) to participate in the negotiation of this Consent Decree.

E. In entering into this Consent Decree, Settling Defendant (as defined below) does not admit any liability to the Plaintiff arising out of the transactions or occurrences alleged in the complaint, nor does Settling Defendant acknowledge that the release or threatened release of hazardous substance(s) at or from the Site constitutes an imminent or substantial endangerment to the public health or welfare or the environment.

F. The Estate is a trust that terminated in January 2007. The property that EPA has designated as the Site, as depicted on the map attached as Appendix E, was owned by the Estate from before the 1940s until November 2006, when it was conveyed to JCCLLC, pursuant to the

Estate's court approved termination plan. EPA contends that during the course of the Estate's ownership of that property, the Estate's tenant/lessee, Del Monte Fresh Produce (Hawaii), Inc. or its predecessors ("DMFP"), disposed 1,2 dibromo-3-chloropropane ("DBCP") and ethylene dibromide ("EDB") on *the* property so that soil and groundwater contaminated with DBCP and EDB exist on the Site.

G. DBCP and EDB are included in the list of hazardous substances covered by CERCLA, 40 C.F.R. § 302.4.

H. Pursuant to Section 105 of CERCLA, 42 U.S.C. § 9605, EPA placed the Site on the National Priorities List, set forth at 40 C.F.R. Part 300, by publication in the Federal Register on December 16, 1994.

I. The decision by EPA on the remedial action to be implemented at the Site is embodied in a final Record of Decision ("ROD"), executed on September 25, 2003, in which the State has given its concurrence. The ROD includes a responsiveness summary to the public comments. Notice of the final plan was published in accordance with Section 117(b) of CERCLA.

J. The ROD lists two components of remedial action to be implemented at the Site: 1) perched groundwater extraction, soil vapor extraction and installation of a vegetative soil cap over the contaminated soil in the Source Area ("Remedy for the Perched Aquifer and Deep Soils"); and 2) basal groundwater extraction and treatment with a contingency for monitored natural attenuation ("Remedy for the Basal Aquifer"). Institutional controls, in the form of land and/or water use restrictions, are an integral part of each of these components of the remedial action in order to prevent any exposure of the public to contaminants at the Site while cleanup levels have not been achieved, as well as to prevent any interference with any aspect of the remedial action.

K. Settling Defendant has informed EPA that Settling Defendant is selling property located within, adjacent to and near the currently defined Site. Settling Defendant recognizes that pursuant to Section VIII (Modification of Institutional Controls) of this Consent Decree, EPA may expand the boundaries of the Site, Source Area, and Well Restriction Area to include

all or a portion of these properties. Settling Defendant further understands that in that case, EPA may require, for example, that ground water monitoring and extraction well requirements and restrictions may apply to these properties.

L. Solely for the purposes of Section 113(j) of CERCLA, the Institutional Controls to be implemented under this Consent Decree shall constitute a response action taken or ordered by the President.

M. The Parties recognize, and the Court by entering this Consent Decree finds, that this Consent Decree has been negotiated by the Parties in good faith and implementation of this Consent Decree will avoid prolonged and complicated litigation between the Parties, and that this Consent Decree is fair, reasonable, and in the public interest.

NOW, THEREFORE, it is hereby Ordered, Adjudged, and Decreed:

II. Jurisdiction

I. This Court has jurisdiction over the subject matter of this action pursuant to 28 U.S.C. §§ 1331 and 1345, and 42 U.S.C. §§ 9606, 9607, and 9613(b). This Court also has personal jurisdiction over Settling Defendant. Solely for the purposes of this Consent Decree and the underlying complaint, Settling Defendant waives all objections and defenses that it may have to jurisdiction of the Court or to venue in this District. Settling Defendant shall not challenge the terms of this Consent Decree or this Court's jurisdiction to enter and enforce this Consent Decree.

III. Parties Bound

2. This Consent Decree applies to, and is binding upon and shall inure to the benefit of, the United States on the one hand, and Settling Defendant and/or its successors and assigns, on the other hand. Any change in ownership or status of Settling Defendant including, but not limited to, any transfer of assets or real or personal property, shall in no way alter Settling Defendant's responsibilities under this Consent Decree, except as provided in Paragraphs 8 and 17

IV. Definitions

3. Unless otherwise expressly provided herein, terms used in this Consent Decree, which are defined in CERCLA or in regulations promulgated under CERCLA, shall have the meaning assigned to them in CERCLA or in such regulations. Whenever terms listed below are used in this Consent Decree or in the appendices attached hereto and incorporated hereunder, the following definitions shall apply:

"CERCLA" shall mean the Comprehensive Environmental Response, Compensation, and Liability Act of 1980, as amended, 42 U.S.C. §§ 9601, et seq.

"Consent Decree" shall mean this Consent Decree and all appendices attached hereto (listed in Section XXV). In the event of conflict between this Consent Decree and any appendix, this Consent Decree shall control.

"Day" shall mean a calendar day unless expressly stated to be a working day. "Working day" shall mean a day other than a Saturday, Sunday, or federal holiday. In computing any period of time under this Consent Decree, where the last day would fall on a Saturday, Sunday, or federal holiday, the period shall run until the close of business of the next working day.

"Declaration of Environmental Restrictions" shall mean: in the case of the Source Area, the Declaration of Environmental Restrictions attached as Appendix A; in the case of the Well Restriction Area, the Declaration of Environmental Restrictions attached as Appendix B; and, with respect to access to the Site, including the Source Area and the Well Restriction Area, the Declaration of Environmental Restrictions attached as Appendix C

"Del Monte Fresh Produce (Hawaii), Inc. Consent Decree" shall mean the consent decree involving the United States and Del Monte Fresh Produce (Hawaii), Inc., entered by the United States District Court for the District of Hawaii on September 27, 2005.

"Effective Date" shall be the effective date of this Consent Decree as provided in Section XXIII (Effective Date).

"EPA" shall mean the United States Environmental Protection Agency and any successor departments or agencies of the United States.

"Estate" shall mean C.R. Churchill, D.A. Heenan, Richard W. Gushman, II and Ronald J. Zlatoper, the duly appointed, qualified and acting Trustees under the Will and of the Estate of James Campbell, Deceased, acting in their fiduciary and not in their individual capacities, and their predecessor and any successor trustees.

"Further Institutional Controls" shall mean any non-engineering, legal measures designed to prevent any exposure of the public to the contaminants at the Site while cleanup levels have not been achieved and to prevent any interference with any component of the Remedy for the Perched Aquifer and Deep Soils and the Remedy for the Basal Aquifer, in addition to those restrictions on land and/or water use at the Source Area and the Well Restriction Area, and as described in and subject to Sections IX (Remedy Review and Further Institutional Controls) and XVI [Covenants Not to Sue by Plaintiff).

"Future Response Costs" shall mean all costs incurred after the Effective Date, including, but not limited to, direct and indirect costs, that the United States incurs in reviewing or developing reports and other items pursuant to this Consent Decree, verifying the Work, or otherwise implementing, overseeing, or enforcing this Consent Decree, including, but not limited to, payroll costs, contractor costs, travel costs, and costs incurred pursuant to Section IX (Remedy Review and Further Institutional Controls) and Section VII (Institutional Controls) (including, but not limited to, the cost of attorney time to the extent permitted by CERCLA and any monies paid by the United States to secure access and/or to implement Institutional Controls including, but not limited to, the amount of just compensation), but only to the extent such Future Response Costs are not required to be paid by Del Monte Fresh Produce (Hawaii), Inc. pursuant to the Del Monte Fresh Produce (Hawaii), Inc. Consent Decree.

"Institutional Controls" shall mean those restrictions on land and/or water use at the Source Area and the Well Restriction Area as described in Section VII (Institutional Controls) as they may be modified pursuant to Section VIII (Modification of Institutional Controls).

"Interest" shall mean interest at the rate specified for interest on investments of the EPA Hazardous Substance Superfund established by 26 U.S.C. § 9507, compounded annually on October 1 of each year, in accordance with 42 U.S.C. § 9607(a). The applicable rate of interest shall be the rate in effect at the time

the interest accrues. The rate of interest is subject to change on October 1 of each year.

"JCCLLC" shall mean James Campbell Company, LLC, a Delaware limited liability company.

"National Contingency Plan" or "**NCP**" shall mean the National Oil and Hazardous Substances Pollution Contingency Plan promulgated pursuant to Section 105 of CERCLA, 42 U.S.C. § 9605, codified at 40 C.F.R. Part 300, and any amendments thereto.

"Paragraph" shall mean a portion of this Consent Decree identified by an arabic numeral or an upper case letter.

"Party" shall mean the United States or Settling Defendant. "Parties" shall mean the United States and Settling Defendant.

"Past Response Costs" shall mean all costs incurred up to the Effective Date, including, but not limited to, direct and indirect costs, that the United States incurred in connection with the negotiation and entry of this Consent Decree, including, but not limited to, payroll costs, contractor costs, and travel costs (including the cost of attorney time to the extent permitted by CERCLA), but shall not include any costs previously reimbursed by Settling Defendant or any other entity, or required to be reimbursed by Del Monte Fresh Produce (Hawaii), Inc. pursuant to the Del Monte Fresh Produce (Hawaii), Inc. Consent Decree.

"Plaintiff" shall mean the United States of America.

"RCRA" shall mean the Solid Waste Disposal Act, as amended, 42 U.S.C. §§ 6901, et seq. (also known as the Resource Conservation and Recovery Act).

"Record of Decision" or "ROD" shall mean the EPA Record of Decision relating to the Site signed on September 25, 2003, by the Regional Administrator, EPA Region IX, or his/her delegate, and all attachments thereto. The ROD is attached as Appendix D.

"Remedy for the Basal Aquifer" shall mean the component of remedial action to be implemented at the Site involving basal groundwater extraction and treatment and contingent monitored natural attenuation, as provided in the ROD.

"Remedy for the Perched Aquifer and Deep Soils" shall mean the component of remedial action to be implemented at the Site involving perched groundwater extraction and treatment, soil vapor extraction and installation of a vegetative soil cap over the contaminated soil in the Source Area, as provided in the ROD.

"Section" shall mean a portion of this Consent Decree identified by a Roman numeral.

"Settling Defendant" shall mean JCCLLC and also, for purposes of Paragraphs 54 and 64 only of this Consent Decree, (i) JCCLLC's predecessor, the Estate, and the Estate's officers, trustees and employees acting in their capacities as such, (ii) JCCLLC's officers, directors (i.e. managers) and employees acting in their capacities as such, and (iii) the Estate's beneficiaries listed on Appendix G, JCCLLC's current shareholders (i.e. members) listed on Appendix H, and future shareholders of JCCLLC (but only to the extent that any such future shareholder has no liability for the Site other than liability derived from that person or entity's relationship to or affiliation with JCCLLC),

"Site" shall mean the Del Monte Fresh Produce (Hawaii) Inc. site currently encompassing approximately 3,000 acres, located in Kunia, Hawaii. The Site is depicted on the map ("Site map") attached as Appendix E. The Site map includes areas south of and within the current Site that are currently under investigation or that may in the future be under investigation by EPA, and that may be included within the Site boundaries if EPA determines that the areal extent of contamination from releases at or from the Site extends to these areas and/or that these are areas necessary for the implementation of the Remedy for the Basal Aquifer. Either Party may seek to modify the boundaries of the Site pursuant to Section VIII (Modification of Institutional Controls). As set forth in Section VIII (Modification of institutional Controls) of the Consent Decree, EPA is nor otherwise limited from including within the Site boundaries areas south of the current Site or other property not identified within the current Site boundaries. Further, as set forth in Section VIII (Modification of Institutional Controls) of the Consent Decree, EPA may contract the Site boundaries based upon the results of the Site investigation. As depicted on the map attached as Appendix E, State Court Land Lots 171, 878, 881 and 16851 (formerly part of Lot 12008) adjoin the Site and are not part of the Site as of the date of lodging of the Consent Decree, provided however, these parcels may become part of the Site pursuant to Section VIII (Modification of Institutional Controls).

"State" shall mean the State of Hawaii.

"Source Area" refers to that part of the Site where the Kunia Village area (as defined in the ROD), the phytoremediation treatment units and the basal groundwater treatment systems are located, and to the portion of the perched aquifer in the Kunia Village area where concentrations of Site contaminants in groundwater exceed 1 ug/L. The boundaries of the Source Area based upon current information are depicted on the map attached as Appendix F. The boundaries of the Source Area shall be modified, if necessary, as provided in Paragraph 18. In addition, either Party may seek to modify the boundaries of the Source Area pursuant to Section VIII (Modification of Institutional Controls).

"United States" shall mean the United States of America.

"Waste Material" shall mean: a) any "hazardous substance" under Section 101(14) of CERCLA, 42 U.S.C. § 9601(14); b) any pollutant or contaminant under Section 101(33), 42 U.S.C. § 9601(33); c) any "solid waste" under Section 1004(27) of RCRA, 42 U.S.C. § 6903(27).

"Well Restriction Area" is that part of the Site where contaminants from releases at or from the Site may exceed maximum contaminant levels in the basal groundwater. The boundaries of the Well Restriction Area based upon current information are depicted on the map attached as Appendix E. Either Party may seek to modify the boundaries of the Well Restriction Area pursuant to Section VIII (Modification of Institutional Controls).

"Work" shall mean all activities Settling Defendant is required to perform under this Consent Decree, except those required by Section XX (Retention of Records). "Work" does not include any of the activities Del Monte Fresh Produce (Hawaii), Inc. is required to perform under the Del Monte Fresh Produce (Hawaii), Inc. Consent Decree.

V. General Provisions

4. Objectives of the Parties. The objectives of the Parties in entering into this Consent Decree are to protect public health or welfare or the environment at the Site by the implementation of Institutional Controls at the Site, and to resolve the claims of Plaintiff against Settling Defendant and its predecessor, the Estate, as provided in this Consent Decree

5. Commitments by Settling Defendant. Settling Defendant shall perform the Work in accordance with this Consent Decree.

6. Compliance With Applicable Law. All activities undertaken by Settling Defendant pursuant to this Consent Decree shall be performed in accordance with the requirements of all applicable federal and state laws and regulations. Settling Defendant must also comply with all applicable or relevant and appropriate requirements of all federal and state environmental laws as set forth in the ROD. The activities conducted pursuant to this Consent Decree, if approved by EPA, shall be considered to be consistent with the NCP.

7. Notice to Successors-in-Title. At least thirty (30) days prior to Settling Defendant's conveyance of title in property located within the Site as depicted on the map attached as Appendix E, Settling Defendant shall give the successor-in-title written notice of: a) this Consent Decree; and b) each applicable Declaration of Environmental Restrictions executed and recorded pursuant to Section VII (Institutional Controls). At least thirty (30) days prior to such conveyance, Settling Defendant shall also give written notice to EPA of the proposed conveyance, including the name and address of the successor-in-title, and the date on which written notice of this Consent Decree and each such Declaration of Environmental Restrictions was given to the successor-in-title.

8. Except as provided in Paragraph 17, in the event of such conveyance, Settling Defendant's obligations under this Consent Decree, including, but not limited to, its obligations to abide by the Site access requirements and Institutional Controls of this Consent Decree, pursuant to Section VI (Site Access) and Section VII (Institutional Controls), shall continue to be met by Settling Defendant, absent prior written consent of EPA. If EPA's prior written consent is required and EPA gives such consent, the successor-in-title may perform some or all of the Work under this Consent Decree.

VI. Site Access

9. Commencing upon the date of lodging of this Consent Decree and through the date of Certification of Completion of the Work by EPA pursuant to Subparagraph 47 b. of Section XIV (Certification of Completion) of the Del Monte Fresh Produce (Hawaii), Inc.

Consent Decree, Settling Defendant agrees, upon request, to provide the United States and its representatives, including EPA and its contractors, reasonable access to property located within the Site and to any other property which is owned by Settling Defendant at the time the request for access is made and to which access is determined by EPA to be required for the implementation of this Consent Decree or the Del Monte Fresh Produce (Hawaii), Inc. Consent Decree, or for the purpose of conducting any response activity related to the Site, including but not limited to:

- a) monitoring for investigation, removal, remedial or other activities at the Site;
- b) verifying any data or information submitted to the United States;
- c) conducting investigations relating to contamination at the Site;
- d) obtaining samples;
- e) inspecting and copying records, or other documents maintained or generated by Settling Defendant or its agents, consistent with Section XIX (Access to Information);
- f) determining whether the Site or other property is being used in a manner that is prohibited or restricted, or that may need to be restricted by or pursuant to this Consent Decree;
- g) assessing the need for planning or implementing response actions (including maintenance) at or near the Site; and
- h) assessing Settling Defendant's compliance with this Consent Decree.

VII. Institutional Controls

A. Use Restrictions for the Source Area

10 The Source Area shall not be used in any manner that causes a threat to public health until Certification of Completion of the Work by EPX pursuant to Subparagraph 37 b of

Section XIV (Certification of Completion) of the Del Monte **Fresh** Produce (Hawaii), Inc. Consent Decree, Settling Defendant is specifically prohibited from using or redeveloping the Source Area for: residential use; use as a hospital, school for people aged 21 and under, or day care center; or other uses by sensitive receptors, as defined by EPA's risk assessment.

11. Settling Defendant shall not permit construction on the Source Area that damages or interferes with any equipment or other components of the Remedy for the Perched Aquifer and Deep Soils, including the vegetative soil cap, groundwater extraction and monitoring wells and conveyance pipelines, the soil vapor extraction system, the phytoremediation treatment units and the basal groundwater treatment system.

B. Use Restrictions for the Well Restriction Area

12. Until Certification of Completion of the Work by EPA pursuant to Subparagraph 47 b. of Section XIV (Certification of Completion) of the Del Monte Fresh Produce (Hawaii), Inc. Consent Decree, Settling Defendant shall not file or join in an application for a Water-Use Permit to withdraw water from a well located or to be located in the Well Restriction Area, absent prior written approval of EPA, which approval shall be granted if such withdrawal would not interfere with the Remedy for the Basal Aquifer and/or cause exposure to basal groundwater impacted by Site contaminants.

13. Prior to Certification of Completion of the Work by EPA pursuant to Subparagraph 47 b. of Section XIV (Certification of Completion) of the Del Monte Fresh Produce (Hawaii), Inc. Consent Decree, should Settling Defendant learn that an application for a Water-Use Permit to draw water from a well located in the Well Restriction Area has been filed as to any property then owned by Settling Defendant, without joinder by Settling Defendant, Settling Defendant shall notify EPA as well as the Hawaii Commission on Water Resource Management and shall file an objection to the issuance of a Water-Use permit with the Water Resource Management Commission.

14. Prior to Certification of Completion of the Work by EPA pursuant to Subparagraph 47 b. of Section XIV (Certification of Completion) of the Del Monte Fresh Produce (Hawaii), Inc. Consent Decree, Settling Defendant shall not permit construction in the

Well Restriction Area that damages or interferes with any equipment or other components of the Remedy for the Basal Aquifer, including the groundwater monitoring wells.

C. Additional Use Restrictions

15. ISEPA determines that land/water use restrictions in the form of state or local laws, regulations, ordinances or other governmental controls are needed to implement the remedies selected in the ROD, ensure the integrity and protectiveness thereof, or ensure non-interference therewith, Settling Defendant shall not oppose EPA's efforts to secure such governmental controls.

D. Annual Report

16. In order to assist EPA in monitoring the effectiveness of the institutional Controls at the Site, Settling Defendant agrees to submit annually to EPA, for its review and approval, an Institutional Controls Annual Report ("IC Annual Report"), beginning on the first anniversary of the Effective Date. The IC Annual Report shall list the Institutional Controls at the Site, and shall briefly summarize the activities Settling Defendant has undertaken in the previous year to oversee and monitor Institutional Controls at the Site.

Binding Effect of Land/Water Use Restrictions

17. Settling Defendant agrees to convey title in property located within the Site as depicted on the map attached as Appendix E conditioned on the successor-in-title taking such property subject to the obligations in each Declaration of Environmental Restrictions applicable to such property; provided, however, that the obligations in each Declaration of Environmental Restrictions applicable to such property shall be binding upon the successor-in-title only for such period as the successor-in-title shall have title to the property or any part thereof. In addition, upon and following Settling Defendant's conveyance of property as provided in this Paragraph, the successor-in-title, and not Settling Defendant, shall be responsible for performing the obligations in each Declaration of Environmental Restrictions applicable to the property, except that Settling Defendant shall be responsible for seeking in good faith to enforce the rights reserved to it and EPA in each such Declaration of Environmental Restrictions to the extent EPA is not able to enforce such rights.

F. Declarations of Environmental Restrictions

18. Within sixty (60) days of written notice from EPA that EPA has approved the final design of the vegetative soil cap for the Source Area, Settling Defendant shall submit to EPA a modified version of the map of the Source Area attached as Appendix F, if necessary to fully encompass the vegetative soil cap and the pilot scale and the full scale phytoremediation treatment units and the basal groundwater treatment system. EPA may approve the proposed modified version of that map with or without further modification. Within fourteen days (14) days of the later of EPA's approval of a modified version of that map pursuant to this Paragraph or Paragraph 22 or final resolution of any dispute resolution initiated by Settling Defendant with respect to such approval pursuant to Paragraph 23, Settling Defendant shall initiate the process for subdivision of the Source Area. Within forty-five (45) days of approval by local Hawaii authorities of the subdivision of the Source Area, and in no event later than December 31, 2009, Settling Defendant shall execute and record a Declaration of Environmental Restrictions that is substantially in the form of Appendix A, binding successors-in-title to the Source Area to provisions in this Consent Decree, as provided in Appendix A.

19. Within forty-five (45) days of entry of this Consent Decree, Settling Defendant shall execute and record each of the following: a Declaration of Environmental Restrictions that is substantially in the form of Appendix B, binding successors-in-title to property within the Well Restriction Area to provisions in this Consent Decree, as provided in Appendix B; and a Declaration of Environmental Restrictions that is substantially in the form of Appendix C, binding successors-in-title to property located within the Site as depicted on the map attached as Appendix E, including property within the Source Area and the Well Restriction Area, to the Site access provisions in this Consent Decree, as provided in Appendix C.

20. Settling Defendant shall provide EPA with twenty-one (21) days to review each Declaration of Environmental Restrictions before it is recorded: to enable EPA to review it for conformance with Appendix A, Appendix B or Appendix C. EPX shall provide Settling Defendant with any comments it may have on each Declaration of Environmental Restrictions within such twenty-one (21) day review period, after which Settling Defendant may record the Declaration of Environmental Restrictions.

G. Retention of Rights

21 . Notwithstanding any provision of this Consent Decree, the United States retains all of its information gathering, inspection, and access authorities and rights, including enforcement authorities related thereto, under CERCLA, RCRA, and any other applicable statute or regulations.

VIII. Modification of Institutional Controls

A. Settling Defendant Request to Modify Institutional Controls

32. If Settling Defendant seeks a modification to the Institutional Controls in this Consent Decree, including modification to the boundaries of the Site or Well Restriction Area as depicted on the map attached as Appendix E, or modification to the boundaries of the Source Area as depicted on the map approved by EPA pursuant to Paragraph 18, Settling Defendant shall obtain the prior written approval of EPA to the requested modification. Settling Defendant shall submit a request in writing to EPA, with all necessary supporting documentation. EPA shall respond to such request within a reasonable time, by: a) providing written approval of the requested modification (with or without modification); b) requesting further information in support of the request; or c) denying the request.

23. If Settling Defendant objects to the decision of EPA regarding such a modification pursuant to the preceding Paragraph 22, it may seek a review of that decision by the Director of the Superfund Division, EPA Region IX, which shall be final and not subject to judicial review. The Institutional Controls, including the boundaries of the Site or Well Restriction Area as depicted on the map attached as Appendix E, or the boundaries of the Source Area as depicted on the map approved by EPA pursuant to Paragraphs 18 or 22, shall be modified, if at all, in accordance with final resolution of the dispute.

B. EPA Determination to Implement Modified Institutional Controls

34 If EPA determines that modifications (including additions) to the Institutional Controls are necessary to carry out or maintain the effectiveness of the remedies set forth in the ROD, including modification to the boundaries of the Site or Well Restriction Area as depicted

on the map attached as Appendix E, or modification to the boundaries of the Source Area as depicted on the map approved by EPA pursuant to Paragraphs 18 or 22, Settling Defendant, or any successors-in-title under the applicable Declaration of Environmental Restrictions, shall, subject to Paragraph 26, implement such modifications. Such modifications may only be required to the extent consistent with the scope of the remedies selected in the ROD.

25. Settling Defendant will be provided with an opportunity to confer with EPA on any modifications (including additions) to Institutional Controls before they are required by EPA to be implemented pursuant to Paragraph 24.

26. If Settling Defendant objects to implementing any modifications (including additions) to Institutional Controls required by EPA pursuant to Paragraph 24, it may seek a review of that decision by the Director of the Superfund Division, EPA Region IX, which EPA contends shall be final and not subject to judicial review, but as to which Settling Defendant reserves the right to seek judicial review pursuant to Paragraph 40. The Institutional Controls, including the boundaries of the Site or Well Restriction Area as depicted on the map attached as Appendix E, or the boundaries of the Source Area as depicted on the map approved by EPA pursuant to Paragraphs 18 or 22, shall be modified, if at all, in accordance with final resolution of the dispute.

27. Nothing in this Section shall be construed to limit EPA's authority to require performance of Further Institutional Controls as otherwise provided in this Consent Decree, including, but not limited to, EPA's authority under Section IX (Remedy Review and Further Institutional Controls) and Section XVI (Covenants Not to Sue by Plaintiff) of this Consent Decree. The rights afforded EPA under Section VIII (Modification of Institutional Controls), are, in addition to the rights provided under Section IX (Remedy Review and Further Institutional Controls) and Section XVI (Covenants Not to Sue by Plaintiff) of this Consent Decree. Further, the standards set forth in Section IX (Remedy Review and Further Institutional Controls) and Section XVI (Covenants Not to Sue by Plaintiff) of this Consent Decree that permit EPA to select Further Institutional Controls do not restrict EPA's right to impose Institutional Controls pursuant to Section VIII (Modification of Institutional Controls); provided however, EPA is only permitted to impose Institutional Controls pursuant to Section VIII (Modification of Institutional

Controls) to the extent such controls are necessary to carry out or maintain the effectiveness of the remedies set forth in the ROD and are consistent with the scope of the remedies selected in the ROD.

IX. Remedy Review and Further Institutional Controls

28. Periodic Review. Settling Defendant shall cooperate with the conduct of any studies and investigations as requested by EPA, in order to permit EPA to conduct reviews of whether the Institutional Controls are protective of human health and the environment at least every five (5) years as required by Section 121(c) of CERCLA and any applicable regulations.

9. EPA Selection of Further Institutional Controls. If EPA determines at any time that the Institutional Controls undertaken pursuant to the ROD are not protective of human health and the environment, EPA may select Further Institutional Controls for the Site in accordance with the requirements of CERCLA and the NCP.

30. Opportunity To Comment. Settling Defendant, any affected successor-in-title, and, if required by Sections 113(k)(2) or 117 of CERCLA, the public, will be provided with an opportunity to comment on any Further Institutional Controls proposed by EPA as a result of the review conducted pursuant to Section 121(c) of CERCLA and to submit written comments for the record during the comment period.

31. Obligation to Perform Further Institutional Controls Under This Consent Decree. If EPA selects Further Institutional Controls for the Site prior to Certification of Completion of the Work pursuant to Subparagraph 47 b. of Section XIV (Certification of Completion) of the Del Monte Fresh Produce (Hawaii), Inc., Consent Decree, Settling Defendant, or any affected successor-in-title pursuant to the applicable Declaration of Environmental Restrictions, shall undertake such Further Institutional Controls to the extent that the reopener in Paragraphs 55 or 56 (United States' reservations of liability based on unknown conditions or new information) are satisfied. Settling Defendant, on behalf of itself or any successor-in-title, may invoke the procedures set forth in Section XIII (Dispute Resolution) to dispute:

a) EPA's determination that the reopener conditions of Paragraphs 55 or 56 of Section XVI (Covenants Not to Sue by Plaintiff) are satisfied;

b) EPA's determination that the Institutional Controls are not protective of human health and the environment; or

c) EPA's selection of the Further Institutional Controls. Disputes pertaining to whether the Institutional Controls are protective or to EPA's selection of Further Institutional Controls shall be resolved pursuant to Paragraph 40 (record review).

X. Reporting Requirements

32. All documents submitted by Settling Defendant to EPA which purport to document Settling Defendant's compliance with the terms of this Consent Decree shall be signed by an authorized representative of Settling Defendant.

XI. Project Coordinators

33. Settling Defendant's Project Coordinator will be David H. Franzel. Within twenty (20) days of lodging this Consent Decree, Settling Defendant will notify EPA in writing of the name, address and telephone number of its designated Alternate Project Coordinator, and EPA will notify Settling Defendant in writing of the name, address and telephone number of its designated Project Coordinator and Alternate Project Coordinator. If a Project Coordinator or Alternate Project Coordinator initially designated is changed, the identity of the successor will be provided to the other Party at least five (5) working days before the change occurs, unless impracticable, but in no event later than the actual day the change is made. Settling Defendant's successor Project Coordinator(s) shall be subject to disapproval by EPA and shall be able to adequately oversee all aspects of the Work. Settling Defendant's Project Coordinator shall not be an outside attorney for Settling Defendant in this matter. He or she may assign other representatives, including contractors, to serve as a Site representative.

34. Plaintiff may designate other representatives, including, but not limited to, EPA employees, and federal contractors and consultants, to observe and monitor the progress of any activity undertaken pursuant to this Consent Decree. EPA's Project Coordinator and Alternate Project Coordinator shall have the authority lawfully vested in a Remedial Project Manager ("RPM") and an On-Scene Coordinator ("OSC") by the NCP, 40 C.F.R. Part 300. In addition, EPA's Project Coordinator or Alternate Project Coordinator shall have authority, consistent with

the RCP, to halt any work required by this Consent Decree and to take any necessary response action when s/he determines that conditions at the Site constitute an emergency situation or may present an immediate threat to public health or welfare or the environment due to release or threatened release of **Waste Material**.

XII. Indemnification

35. Settling Defendant's Indemnification of the United States.

a) The United States does not assume any liability by entering into this Consent Decree or by virtue of any designation of Settling Defendant as EPA's authorized representative under Section 104(e) of CERCLA. Settling Defendant shall indemnify, save and hold harmless the United States and its officials, employees, contractors, subcontractors, agents or authorized representatives for or from any and all claims or causes of action arising from, or on account of, negligent or other wrongful acts or omissions of Settling Defendant, its officers, directors, employees, agents, contractors, subcontractors, and any persons acting on its behalf or under its control, in carrying out activities pursuant to this Consent Decree, including, but not limited to, any claims arising from any designation of Settling Defendant as EPA's authorized representative under Section 104(e) of CERCLA. Further, Settling Defendant agrees to pay the United States all costs it incurs including, but not limited to, attorneys' fees to the extent permitted by CERCLA, and other expenses of litigation and settlement arising from, or on account of, claims made against the United States based on negligent or other wrongful acts or omissions of Settling Defendant, its officers, directors, employees, agents, contractors, subcontractors, and any persons acting on its behalf or under its control, in carrying out activities pursuant to this Consent Decree. The United States shall not be held out as a party to any contract entered into by or on behalf of Settling Defendant in carrying out activities pursuant to this Consent Decree. Neither Settling Defendant nor any such contractor shall be considered an agent of the United States.

b) The United States shall give Settling Defendant written notice of any claim for which the United States plans to seek indemnification pursuant to Paragraph 35, and shall consult with Settling Defendant prior to settling such claim.

36. Settling Defendant waives all claims against the United States for damages or reimbursement or for set-off of any payments made or to be made to the United States, arising from or on account of any contract, agreement, or arrangement between Settling Defendant and any person for performance of the Work on or relating to the Site. In addition, Settling Defendant shall indemnify and hold harmless the United States with respect to any and all claims for damages or reimbursement arising from or on account of any contract, agreement, or arrangement between Settling Defendant and any person for performance of the Work on or relating to the Site.

XIII. Dispute Resolution

37. Unless otherwise expressly provided for in this Consent Decree, the dispute resolution procedures of this Section shall be the exclusive mechanism to resolve disputes arising under or with respect to this Consent Decree. However, the procedures set forth in this Section shall not apply to actions by the United States to enforce obligations of Settling Defendant that have not been disputed in accordance with this Section.

38. Any dispute that arises under or with respect to this Consent Decree shall in the first instance be the subject of informal negotiations between the Parties. The period for informal negotiations shall not exceed twenty (20) days from the time the dispute arises, unless it is modified by written agreement of the Parties. The dispute shall be considered to have arisen when one Party sends the other Party a written notice of dispute ("Notice of Dispute").

39. Statements of Position.

a) In the event that the Parties cannot resolve a dispute by informal negotiations under the preceding Paragraph, then the position advanced by EPA shall be considered binding unless, within fifteen (15) days after the conclusion of the informal negotiation period, Settling Defendant invokes the formal dispute resolution procedures of this Section by serving on the United States a written statement of position ("Statement of Position") on the matter in dispute, including, but not limited to, any factual data, analysis or opinion supporting that position and any supporting documentation relied upon by Settling Defendant. The Statement of Position shall specify Settling Defendant's position as to whether formal

dispute resolution should proceed under Paragraphs 40 or 41.

b) Within twenty (20) days after receipt of Settling Defendant's Statement of Position, EPA will serve on Settling Defendant its Statement of Position, including, but not limited to, any factual data, analysis, or opinion supporting that position and all supporting documentation relied upon by EPA. EPA's Statement of Position shall include a statement as to whether formal dispute resolution should proceed under Paragraphs 40 or 41. Within fifteen (15) days after receipt of EPA's Statement of Position, Settling Defendant may submit a reply.

c) If there is disagreement between EPA and Settling Defendant as to whether dispute resolution should proceed under Paragraphs 40 or 41, the Parties shall follow the procedures set forth in the paragraph determined by EPA to be applicable. However, if Settling Defendant ultimately appeals to the Court to resolve the dispute, the Court shall determine which paragraph is applicable in accordance with the standards of applicability set forth in Paragraphs 40 or 41.

40. Formal dispute resolution for disputes pertaining to the selection or adequacy of any response action and all other disputes that are accorded review on the administrative record under applicable principles of administrative law shall be conducted pursuant to the procedures set forth in this Paragraph. For purposes of this Paragraph, the adequacy of any response action includes, without limitation: a) the adequacy or appropriateness of plans, procedures to implement plans, or any other items requiring approval by EPA under this Consent Decree; and b) the adequacy of the performance of response actions taken pursuant to this Consent Decree. Nothing in this Consent Decree shall be construed to allow any dispute by Settling Defendant regarding the validity of the ROD's provisions.

a) An administrative record of the dispute shall be maintained by EPA and shall contain all Statements of Position, including supporting documentation, submitted pursuant to this Section. Where appropriate, EPA may allow submission of supplemental Statements of Position by the Parties.

b) The Director of the Superfund Division, EPA Region IX, will issue a final administrative decision resolving the dispute based on the administrative record. This decision

shall be binding upon Settling Defendant, subject only to the right to seek judicial review as set forth in this Consent Decree.

c) Any administrative decision made by EPA pursuant to Subparagraph 40 b) shall be reviewable by this Court, provided that a motion for judicial review of the decision is filed by Settling Defendant with the Court and served on EPA within ten (10) days of receipt of EPA's decision. The motion shall include a description of the matter in dispute, the efforts made by the Parties to resolve it, the relief requested, and the schedule, if any, within which the dispute must be resolved to ensure orderly implementation of this Consent Decree. The United States may file a response to Settling Defendant's motion.

d) In proceedings on any dispute governed by this Paragraph, Settling Defendant shall have the burden of demonstrating that the decision of the Superfund Division Director is arbitrary and capricious or otherwise not in accordance with law. Judicial review of EPA's decision shall be on the administrative record.

41. Formal dispute resolution for disputes that neither pertain to the selection or adequacy of any response action nor are otherwise accorded review on the administrative record under applicable principles of administrative law shall be governed by this Paragraph.

a) Following receipt of Settling Defendant's Statement of Position submitted to the Director of the Superfund Division, EPX Region IX, he/she will issue a final decision resolving the dispute. The Superfund Division Director's decision shall be binding on Settling Defendant unless, within ten (10) days of receipt of the decision, Settling Defendant files with the Court and serves on the United States a motion for judicial review of the decision setting forth the matter in dispute, the efforts made by the Parties to resolve it, the relief requested, and the schedule, if any, within which the dispute must be resolved to ensure orderly implementation of this Consent Decree. The United States may file a response to Settling Defendant's motion.

b) Judicial review of any dispute governed by this Paragraph shall be governed by applicable principles of law.

42. The invocation of formal dispute resolution procedures under this Section shall not extend, postpone or affect in any way any obligation of Settling Defendant under this

Consent Decree, not directly in dispute, unless EPA or the Court agrees otherwise. Any stipulated penalties with respect to the disputed matter shall continue to accrue, but payment shall be stayed pending resolution of the dispute. In the event that Settling Defendant does not prevail on the disputed issue, any stipulated penalties with respect to the disputed issue shall be assessed and paid as provided in Section XV (Failure to Comply with Requirements of Consent Decree).

XIV. Force Majeure

33 "Force Majeure," for purposes of this Consent Decree, is defined as any event arising from causes beyond the control of Settling Defendant, or any entity controlled by Settling Defendant, or of Settling Defendant's contractors that delays or prevents the performance of any obligation under this Consent Decree despite Settling Defendant's best efforts to fulfill the obligation. The requirement that Settling Defendant exercises "best efforts to fulfill the obligation" includes using reasonable efforts to anticipate any potential force majeure event and best efforts to address the effects of any potential force majeure event:

- a) as it is occurring; and
- b) following the potential force majeure event, such that the delay is minimized to the greatest extent possible. "Force Majeure" does not include financial inability to complete the Work.

If any event occurs or has occurred that may delay the performance of any obligation under this Consent Decree, whether or not caused by a force majeure event, Settling Defendant shall notify orally EPA within fourteen (14) days of when Settling Defendant first knew that the event might cause a delay. Within fourteen (14) days thereafter, Settling Defendant shall provide, in writing, to EPA:

- c) an explanation and description of the reasons for the delay and the anticipated duration of the delay;
- d) all actions taken or to be taken to prevent or minimize the delay;

e) a schedule for implementation of any measures to be taken to prevent or mitigate the delay or the effect of the delay;

f) Settling Defendant's rationale for attributing such delay to a force majeure event if it intends to assert such a claim; and

g) a statement as to whether, in the opinion of Settling Defendant, such event may cause or contribute to an endangerment to public health, welfare, or the environment. Settling Defendant shall include, with any notice, all available documentation supporting its claim that the delay was attributable to a force majeure event. Failure to comply with the above requirements shall preclude Settling Defendant from asserting any claim of force majeure for that event for the period of time of such failure to comply, and for any additional delay caused by such failure. Settling Defendant shall be deemed to know of any circumstance of which Settling Defendant, any entity controlled by Settling Defendant, or Settling Defendant's contractors knew or should have known.

44. If EPA agrees that the delay or anticipated delay is attributable to a force majeure event, the time for performance of the obligations under this Consent Decree that are affected by the force majeure event will be extended by EPA for such time as is necessary to complete those obligations. An extension of the time for performance of the obligations affected by the force majeure event shall not, of itself, extend the time for performance of any other obligation. If EPA does not agree that the delay or anticipated delay has been or will be caused by a force majeure event, EPA will notify Settling Defendant in writing of its decision. If EPA agrees that the delay is attributable to a force majeure event, EPA will notify Settling Defendant in writing of the length of the extension, if any, for performance of the obligations affected by the force majeure event.

45. If Settling Defendant elects to invoke the dispute resolution procedures set forth in Section XIII (Dispute Resolution), it shall do so no later than fifteen (15) days after receipt of EPA's notice. In any such proceeding, Settling Defendant shall have the burden of demonstrating, by a preponderance of the evidence, that the delay or anticipated delay has been or will be caused by a force majeure event, that the duration of the delay or the extension sought was or will be warranted under the circumstances, that best efforts were exercised to avoid and

mitigate the effects of the delay, and that Settling Defendant complied with the requirements of this Section. If Settling Defendant carries this burden, the delay at issue shall be deemed not to be a violation by Settling Defendant of the affected obligation of this Consent Decree identified to EPA and the Court.

XV. Failure to Comply with Requirements of Consent Decree

46. If Settling Defendant violates this Consent Decree, Settling Defendant shall pay to the United States stipulated penalties as follows:

<u>Penalty Per Violation Per Day</u>	<u>Period of Violation</u>
\$100	1 st through 14 th day
\$300	15 th through 30 th day
\$1,000	31 st day and beyond

47. Stipulated penalties are due and payable within thirty (30) days of the demand for payment of the penalties by EPA unless Settling Defendant invokes the dispute resolution procedures under Section XIII (Dispute Resolution). All payments to the United States under this Section shall indicate that the payment is for stipulated penalties, be made by certified or cashier's check made payable to "EPA Hazardous Substance Superfund," shall be sent to: U.S. Environmental Protection Agency-Region IX, Attn: Superfund Accounting, P.O. Box 360863M, Pittsburgh, Pennsylvania 15251, indicating that the payment is for stipulated penalties, and shall reference the EPA Region and Site ID #0902876, the DOJ Case Number 90-11-3-08277, and the name and address of the party making payment. Copies of the check(s) paid pursuant to this Section, and any accompanying transmittal letter(s), shall be sent to the United States as provided in Section XXII (Notices and Submissions), and to Elaine Chan, Cost Recovery Specialist, Mail Code SFD7-B, U.S. EPA-Region 9, San Francisco, California, 94105, and Thelma Estrada, Assistant Regional Counsel, Mail Code OKC-3, U.S. EPA-Region 9, 75 Hawthorne Street, San Francisco, California 94105.

48. The payment of penalties shall not alter in any way Settling Defendant's obligation to perform or complete the Work required under this Consent Decree.

49. Penalties shall accrue as provided in this Section regardless of whether EPA has notified Settling Defendant of the violation or made a demand for payment, but need only be paid upon demand. All penalties shall begin to accrue on the day after complete performance is due or the day a violation occurs, and shall continue to accrue through the day of completion of the activity or correction of the noncompliance. Nothing herein shall prevent the simultaneous accrual of separate penalties for separate violations of this Consent Decree.

50. Penalties shall continue to accrue during any period of dispute resolution relating to that penalty, but need not be paid until the following:

a) If the dispute is resolved by agreement or by a decision of EPA that is not appealed to this Court, accrued penalties determined to be owing shall be paid to EPA within fifteen (15) days of the agreement or the receipt of EPA's decision or order;

b) If the dispute is appealed to this Court and the United States prevails in whole or in part, Settling Defendant shall pay all accrued penalties determined by the Court to be owed to EPA within sixty (60) days of receipt of the Court's decision or order, except as provided in Subparagraph 50 c); or

c) If the District Court's decision is appealed by any Party, Settling Defendant shall pay all accrued penalties determined by the District Court to be owing to the United States into an interest-bearing escrow account within sixty (60) days of receipt of the Court's decision or order. Penalties shall be paid into this account as they continue to accrue, at least every sixty (60) days. Within fifteen (15) days of receipt of the final appellate court decision, the escrow agent shall pay the balance of the account to EPA, or to Settling Defendant to the extent it prevails.

51. If Settling Defendant fails to pay stipulated penalties when due, the United States may institute proceedings to collect the penalties, as well as Interest. Settling Defendant shall pay Interest on the unpaid balance, which shall begin to accrue on the date of demand. Settling Defendant shall also reimburse the United States for all costs of such action, including but not limited to attorney time and enforcement costs.

52. Nothing in this Consent Decree shall be construed as prohibiting, altering, or in any way limiting the ability of the United States to **seek** any other remedies or sanctions available by virtue of Settling Defendant's violation of this Consent Decree or of the statutes and regulations upon which it is based, including, but not limited to, penalties pursuant to Section 122(l) of CERCLA, provided, however, that the United States shall not seek civil penalties pursuant to Section 122(l) of CERCLA for any violation of this Consent Decree, except in the case of a willful violation of this Consent Decree.

53. Notwithstanding any other provision of this Section, the United States may, in its unreviewable discretion, waive any portion of stipulated penalties that have accrued pursuant to this Consent Decree.

XVI. Covenants Not to Sue by Plaintiff

54. In consideration of the actions that will be performed by Settling Defendant under the terms of this Consent Decree, and except as specifically provided in Paragraphs 55, 56, and 58, the United States covenants not to sue or to take administrative action against Settling Defendant pursuant to Sections 106 and 107 of CERCLA relating to the Site. These covenants shall take effect upon the Effective Date of this Consent Decree. These covenants are conditioned upon the satisfactory performance by Settling Defendant of its obligations under this Consent Decree. These covenants extend only to Settling Defendant and to Settling Defendant's successors-in-title (other than any successor-in-title that otherwise is a responsible or potentially responsible party for the Site) conditioned upon the successor-in-title's satisfactory performance of the obligations in each applicable Declaration of Environmental Restrictions, and do not extend to any other person.

55. United States' Pre-Certification Reservations. Notwithstanding any other provision of this Consent Decree, the United States reserves, and this Consent Decree is without prejudice to, the right to institute proceedings in this action or in a new action, or to issue an administrative order, seeking to a) compel Settling Defendant as to property located within the Site that is then owned by Settling Defendant, or any successors-in-title as to all other property located within the Site and owned by such successors-in-title, to perform Further Institutional Controls relating to such property, or b) to compel Settling Defendant to reimburse the United

States for response costs for Further Institutional Controls relating to the Site, if, prior to Certification of Completion of the Remedial Action by EPX pursuant to Subparagraph 46 b. of Section XIV (Certification of Completion) of the Del Monte Fresh Produce (Hawaii), Inc. Consent Decree:

1) conditions at the Site, previously unknown to EPA are discovered,
or

2) information, previously unknown to EPA, is received, in whole or in part, and EPA determines that these previously unknown conditions or this information together with other relevant information indicate that the Institutional Controls are not protective of human health or the environment.

56. United States' Post-Certification Reservations. Notwithstanding any other provision of this Consent Decree, the United States reserves, and this Consent Decree is without prejudice to, the right to institute proceedings in this action or in a new action, or to issue an administrative order, seeking to a) compel Settling Defendant as to property located within the Site that is then owned by Settling Defendant, or any successors-in-title as to all other property located within the Site and owned by such successors-in-title, to perform Further institutional Controls relating to such property, or b) to compel Settling Defendant to reimburse the United States for response costs for Further Institutional Controls relating to the Site, if, subsequent to Certification of Completion of the Remedial Action by EPA pursuant to Subparagraph 46 b. of Section XIV (Certification of Completion) of the Del Monte Fresh Produce (Hawaii), Inc. Consent Decree:

1) conditions at the Site, previously unknown to EPA are discovered,
or

3) information, previously unknown to EPA, is received, in whole or in part and EPA determines that these previously unknown conditions or this information together with other relevant information indicate that the Institutional Controls are not protective of human health or the environment.

57 For purposes of Paragraph 55, the information and the conditions known to EPA shall include only that information and those conditions known to EPA as of the date the ROD was signed and set forth in the Record of Decision for the Sire and the administrative record supporting the Record of Decision. For purposes of Paragraph 56, the information and the conditions known to EPA shall include only that information and those conditions known to EPA as of the date of Certification of Completion of the Remedial Action by EPA pursuant to Subparagraph 46 b. of Section XIV (Certification of Completion) of the Del Monte Fresh Produce (Hawaii), Inc. Consent Decree, and set forth in the Record of Decision, the administrative record supporting the Record of Decision, the post-ROD administrative record, or in an, information received by EPA pursuant to the requirements of this Consent Decree prior to such Certification of Completion of the Remedial Action.

58. General Reservation of Rights. The United States reserves, and this Consent Decree is without prejudice to, all rights against Settling Defendant with respect to all matters not expressly included within Plaintiff's covenant not to sue. Notwithstanding any other provision of this Consent Decree, the United States reserves all rights against Settling Defendant with respect to

- a) claims based on a failure by Settling Defendant to meet a requirement of this Consent Decree or any Declaration of Environmental Restrictions;
- b) liability arising from the past, present, or future disposal, release, or threat of release by Settling Defendant of Waste Material outside the Site;
- c) liability arising from the future arrangement by Settling Defendant for disposal or treatment of Waste Material at the Site after the Effective Date of this Consent Decree;
- d) liability as a result of the failure by Settling Defendant to exercise due care with respect to Waste Material at the Site after the Effective Date of this Consent Decree;
- e) liability for damages for injury to, destruction of, or loss of natural resources, and for the costs of any natural resource damage assessments;

- f) criminal liability;
- g) liability for violations of federal or state law by Settling Defendant which occur during implementation of the Institutional Controls or Further Institutional Controls; and
- h) liability for the release or threat of release after the Effective Date of this Consent Decree of any Waste Material at the Site caused in whole or in part by the actions or inaction of Settling Defendant.

Notwithstanding any other provision of this Consent Decree, the United States retains all authority and reserves all rights to take any and all response actions authorized by law.

XVII. Covenants Not to Sue by Settling Defendant

59. Subject to the reservations in Paragraph 61, Settling Defendant hereby covenants not to sue and agrees not to assert any claims or causes of action against the United States with respect to the Site, or this Consent Decree, including, but not limited to:

- a) any direct or indirect claim for reimbursement from the Hazardous Substance Superfund (established pursuant to the Internal Revenue Code, 26 U.S.C. § 9507) through CERCLA Sections 106(b)(2), 107, 111, 112, 113, or any other provision of law;
- b) any claims against the United States, including any department, agency or instrumentality of the United States under CERCLA Sections 107 or 113 related to the Site, or
- c) any claims against the United States arising out of response actions at or in connection with the Site, including any claim under the United States Constitution, the Tucker Act, 28 U.S.C. § 1491, the Equal Access to Justice Act, 28 U.S.C. § 2412, as amended, or at common law

60. Except as provided in Paragraph 67 (Waiver of Claim-Splitting Defenses), these covenants not to sue shall not apply in the event that the United States brings a cause of action or issues an order pursuant to the reservations set forth in Paragraphs 55, 56, or 58, but only to the extent that Settling Defendant's claims arise from the same response action, response costs, or

damages that the United States is seeking pursuant to the applicable reservation.

61. Settling Defendant reserves, and this Consent Decree is without prejudice to, claims against the United States, subject to the provisions of Chapter 171 of Title 28 of the United States Code, for money damages for injury or loss of property or personal injury or death caused by the negligent or wrongful act or omission of any employee of the United States while acting within the scope of his office or employment under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred. However, any such claim shall not include a claim for any damages caused, in whole or in part, by the act or omission of any person, including any contractor, who is not a federal employee as that term is defined in 28 U.S.C. § 2671; nor shall any such claim include a claim based on EPA's selection of response actions, or the oversight or approval of Settling Defendant's plans or activities. The foregoing applies only to claims that are brought pursuant to any statute other than CERCLA, and for which the waiver of sovereign immunity is found in a statute other than CERCLA.

62. Nothing in this Consent Decree shall be deemed to constitute preauthorization of a claim within the meaning of Section 111 of CERCLA, 42 U.S.C. § 9611, or 40 C.F.R. § 300.700(d).

XVIII. Effect of Settlement: Contribution Protection

63. Nothing in this Consent Decree shall be construed to create any rights in, or grant any cause of action to, any person not a Party to this Consent Decree, except Settling Defendant's successors-in-title (other than any successor-in-title that otherwise is a responsible or potentially responsible party for the Site) as provided in Paragraph 54, and Settling Defendant's successors-in-title as provided in Paragraph 30. The preceding sentence shall not be construed to waive or nullify any rights that any person not a Party to this Consent Decree may have under applicable law. Each of the Parties expressly reserves any and all rights (including, but not limited to, any right to contribution), defenses, claims, demands, and causes of action which each Party may have with respect to any matter, transaction, or occurrence relating in any way to the Site against any person not a Party hereto.

64. The Parties agree, and by entering this Consent Decree this Court finds, that Settling Defendant is entitled, as of the Effective Date, to protection from contribution actions or claims as provided by CERCLA, Section 113(f)(2), 42 U.S.C. § 9613(f)(2) for matters addressed in this Consent Decree. The "matters addressed" in this Consent Decree are all the response actions taken or to be taken and all response costs incurred or to be incurred by the United States or any other person with respect to the remedial action to be implemented at the Site as provided in the ROD, including the Institutional Controls. The "matters addressed" in this Consent Decree do not include those response costs or response actions as to which the United States has reserved its rights under this Consent Decree (except claims for failure to comply with this Consent Decree), in the event that the United States asserts rights against Settling Defendant coming within the scope of such reservations.

65. Settling Defendant agrees that with respect to any suit or claim for contribution brought by it for matters related to this Consent Decree it will notify the United States in writing no later than sixty (60) days prior to the initiation of such suit or claim.

66. Settling Defendant also agrees that with respect to any suit or claim for contribution brought against it for matters related to this Consent Decree it will notify in writing the United States within ten (10) days of service of the complaint on Settling Defendant.

67. In any subsequent administrative or judicial proceeding initiated by the United States for injunctive relief, recovery of response costs, or other appropriate relief relating to the Site, Settling Defendant shall not assert, and may not maintain, any defense or claim based upon the principles of waiver, res judicata, collateral estoppel, issue preclusion, claim-splitting, or other defenses based upon any contention that the claims raised by the United States in the subsequent proceeding were or should have been brought in the instant case; provided, however, that nothing in this Paragraph affects the enforceability of the covenants not to sue set forth in Section XVI (Covenants Not to Sue by Plaintiff), Section 122(c) of CERCLA and any applicable regulations.

XIX. Access to Information

68. Settling Defendant shall provide to EPA, upon request, copies of all documents and information within its possession or control or that of its contractors or agents relating to activities at the Site or to the implementation of this Consent Decree, including, but not limited to, correspondence or other documents or information related to the Work. Settling Defendant shall also make available to EPA, for purposes of investigation, information gathering, or testimony, its employees, agents or representatives with knowledge or relevant facts concerning the performance of the Work.

69. Business Confidential and Privileged Documents.

a) Settling Defendant may assert business confidentiality claims covering part or all of the documents or information submitted to Plaintiff under this Consent Decree to the extent permitted by and in accordance with Section 104(e)(7) of CERCLA, 42 U.S.C. § 9604(e)(7) and 40 C.F.R. §2.203(b). Documents or information determined to be confidential by EPA will be afforded the protection specified in 40 C.F.R. Part 2, Subpart 8. If no claim of confidentiality accompanies documents or information when they are submitted to EPA, or if EPA has notified Settling Defendant that the documents or information are not confidential under the standards of Section 104(e)(7) of CERCLA or 40 C.F.R. Part 2, Subpart B, the public may be given access to such documents or information without further notice to Settling Defendant.

b) Settling Defendant may assert that certain documents, records and other information are privileged under the attorney-client privilege or any other privilege recognized by federal law. If Settling Defendant asserts such a privilege in lieu of providing documents, it shall provide the Plaintiff with the following: 1) the title of the document, record, or information; 2) the date of the document, record, or information; 3) the name and title of the author of the document, record, or information; 4) the name and title of each addressee and recipient; 5) a description of the contents of the document, record, or information; and 6) the privilege asserted by Settling Defendant. However, no documents, reports or other information created or generated pursuant to the requirements of this Consent Decree shall be withheld on the grounds they are privileged.

XX. Retention of Records

70. Until written notification pursuant to Subparagraph 47 b. of Section XIV (Certification of Completion) of the Del Monte Fresh Produce (Hawaii), Inc. Consent Decree, Settling Defendant shall preserve and retain all non-identical copies of records and documents (including records or documents in electronic form) now in its possession or control or which come into its possession or control that relate in any manner to its liability under CERCLA with respect to the Site, or that relate to the liability of any other person under CERCLA with respect to the Site. These record retention requirements shall apply regardless of any corporate retention policy to the contrary.

71. At the conclusion of this document retention period, Settling Defendant shall notify the United States at least ninety (90) days prior to the destruction of any such records or documents, and upon request by the United States, Settling Defendant shall deliver any such records or documents to EPA. Settling Defendant may assert that certain documents, records, and other information are privileged under the attorney-client privilege or any other privilege recognized by federal law. If Settling Defendant asserts such a privilege, it shall provide the Plaintiff with the following: a) the title of the document, record, or information; b) the date of the document, record, or information; c) the name and title of the author of the document, record, or information; d) the name and title of each addressee and recipient; e) a description of the contents of the document, record, or information; and f) the privilege asserted by Settling Defendant. However, no documents, reports or other information created or generated pursuant to the requirements of this Consent Decree shall be withheld on the grounds they are privileged.

72. Settling Defendant hereby certifies that, to the best of its knowledge and belief, after thorough inquiry, it ~~has~~ not altered, mutilated, discarded, destroyed or otherwise disposed of any records, documents or other information (other than identical copies) relating to its or its predecessor's potential liability regarding the Site since notification to its predecessor of potential liability by the United States regarding the Site and that it and its predecessor have fully complied with any and all EPA requests for information pursuant to Section 104(e) and 122(e) of CERCLA, 42 U.S.C. 9604(e) and 9622(e) and Section 3007 of RCRA, 42 U.S.C. 6927.

XXI. Payment for Response Costs

73 Payments for United States' Past and Future Response Costs.

a) Settling Defendant shall pay to EPA Past Response Costs and Future Response Costs under this Consent Decree not inconsistent with the National Contingency Plan. On a periodic basis EPA will send Settling Defendant a bill requiring payment that includes a "Campbell Cost Summary," which includes Past Response Costs and/or Future Response Costs incurred by EPA and its contractors, and a similar DOJ summary that reflects such costs incurred by DOJ and its contractors, if any. Settling Defendant shall make all payments within thirty (30) days of Settling Defendant's receipt of each bill requiring payment, except as otherwise provided in Subparagraph 73 c). Payment shall be made by certified or cashier's or corporate check made payable to the "United States Environmental Protection Agency," referencing the name and address of the party making payment, EPA ID Number HJD980637631 and DOJ Case Number 90-11-3-08277. The total amount to be paid by Settling Defendant pursuant to this Section shall be deposited in the Campbell Special Account within the EPA Hazardous Substance Superfund to be retained and used to conduct or finance response actions at or in connection with the Site, or to be transferred by EPA to the EPA Hazardous Substance Superfund. Settling Defendant shall send the check to:

U.S. Environmental Protection Agency
Region 9, Superfund
P.O. Box 371099M
Pittsburgh, Pennsylvania 15251

Any payments received by EPA after 4:00 p.m. (Eastern Time) will be credited on the next business day.

b) **At** the time of payment, Settling Defendant shall send written notice that payment has been made to the United States, to EPA, and to the Regional Financial Management Office, in accordance with Section XXII (Notices and Submissions).

c) Settling Defendant may contest payment of any Past Response Costs or Future Response Costs under this Consent Decree if Settling Defendant determines that the United States has made an accounting error, or **if** Settling Defendant alleges that a cost *item* that

is included represents costs that are not Past Response Costs or Future Response Costs under this Consent Decree or are inconsistent with the NCP. Such objection shall be made in writing within thirty (30) days of receipt of the bill and must be sent to the United States (if the United States' accounting is being disputed) pursuant to Section XXII (Notices and Submissions). Any such objection shall specifically identify the contested Past Response Costs or Future Response Costs and the basis for objection. In the event of an objection, Settling Defendant shall, within the thirty (30) day period, pay all uncontested Past Response Costs or Future Response Costs to the United States in the manner described in Subparagraph 73 a). Simultaneously, Settling Defendant shall establish an interest-bearing escrow account in a federally-insured bank duly chartered in the State of Hawaii and remit to that **escrow** account funds equivalent to the amount of the contested Past Response Costs or Future Response Costs. Settling Defendant shall send to the United States, as provided in Section XXII (Notices and Submissions) one (1) copy of the transmittal letter and check paying the uncontested Past Response Costs or Future Response Costs, and one (1) copy of the correspondence that establishes and funds the escrow account, including but not limited to, information containing the identity of the bank and bank account under which the escrow account is established, as well as a bank statement showing the initial balance of the escrow account. Simultaneously with the establishment of the escrow account, Settling Defendant shall initiate Dispute Resolution procedures in Section XIII (Dispute Resolution). If the United States prevails in the dispute, within five (5) days of the resolution of the dispute, Settling Defendant shall pay the **sums** due (with accrued interest) to the United States in the manner described in Subparagraph 73 aj). If Settling Defendant prevails concerning any aspect of the contested costs, Settling Defendant shall pay that portion of the costs (plus associated accrued interest) for which it did not prevail to the United States in the manner described in Subparagraph 73 a). Settling Defendant shall be disbursed any balance of the escrow account. The dispute resolution procedures set forth in this Paragraph in conjunction with the procedures set forth in Section XIII (Dispute Resolution) shall be the exclusive mechanisms for resolving disputes regarding Settling Defendant's obligation to reimburse the United States for Past Response Costs or Future Response Costs.

d) in the event that the payments required by Subparagraph 73 c) are not made within thirty (30) days of Settling Defendant's receipt of the bill, Settling Defendant shall pay interest on the unpaid balance. The interest to be paid on Past Response Costs or Future

Response Costs shall begin to accrue on the date of the bill. The Interest shall accrue through the date of Settling Defendant's payment. Payments of Interest made under this Paragraph shall be in addition to such other remedies or sanctions available to Plaintiff by virtue of Settling Defendant's failure to make timely payments under this Section including, but not limited to, payment of any applicable stipulated penalties pursuant to Section XV (Failure to Comply with Requirements of Consent Decree). Settling Defendant shall make all payments required by this Paragraph in the manner described in Subparagraph 73 a).

XXII. Notices and Submissions

74. Whenever, under the terms of this Consent Decree, written notice is required to be given or a report or other document is required to be sent by one Party to the other, it shall be directed to the individuals at the addresses specified below, unless those individuals or their successors give notice of a change to the other Party in writing. All written notices and submissions shall be considered effective upon receipt, unless otherwise provided. Written notice as specified herein shall constitute complete satisfaction of any written notice requirement of this Consent Decree with respect to the United States, EPA, and Settling Defendant, respectively.

As to the United States:

Chief, Environmental Enforcement Section
Environment and Natural Resources
Division
U.S. Department of Justice
P.O. Box 7611
Washington, D.C. 20044-7611
Re: DJ # 90-11-3-08277

As to EPA:

Director, Superfund Division
United States Environmental Protection
Agency
Region IX
75 Hawthorne Street
San Francisco, California 94105

Janet Rosati
EPA Project Coordinator
United States Environmental Protection
Agency
Region IX
75 Hawthorne Street
San Francisco, California 94105

As to the Regional Financial
Management Officer:

Dave Woods, Mail Code PMD-5
United States Environmental Protection
Agency
Region IX
75 Hawthorne Street
San Francisco, California 94105

As to Settling Defendant:

Stephen H. MacMillan
President and Chief Executive Officer
James Campbell Company LLC
James Campbell Building
1001 Kamokila Blvd.
Kapolei, Hawaii 96707

David H. Franzel, Esq.
Project Coordinator
James Campbell Company LLC
James Campbell Building
1001 Kamokila Blvd.
Kapolei, Hawaii 96707

XXIII. Effective Date

75. The Effective Date of **this** Consent Decree shall be the date upon which this Consent Decree is entered by the Court.

XXIV. Retention of Jurisdiction

76. This Court retains jurisdiction over both the subject matter of this Consent Decree and Settling Defendant for the duration of the performance of the terms and provisions of this Consent Decree for the purpose of enabling any of the Parties to **apply to the Court** at any time for such further order, direction, and relief as may be necessary or appropriate for the construction or modification of this Consent Decree, or to **effectuate** or enforce compliance with its terms, or to resolve disputes in accordance with Section XIII (Dispute Resolution) hereof.

XXV. Appendices

77. The following appendices we attached to and incorporated into this Consent Decree:

"Appendix A" is the Declaration of Environmental Restrictions for the Source Area.

"Appendix B" is the Declaration of Environmental Restrictions for the Well Restriction Area.

"Appendix C" is the Declaration of Environmental Restrictions for access to the Site, including the Source Area and Well Restriction Area.

"Appendix D" is the ROD.

"Appendix E" is the map of the Site and the Well Restriction Area.

"Appendix F" is the map of the Source Area.

"Appendix G" is a list of the Estate's beneficiaries.

"Appendix H" is a list of JCCLLC's current shareholders.

XXVI. Modification

78. Schedules specified for completion of the **Work** may be modified by agreement of EPA and Settling Defendant. All such modifications shall be made in writing.

79. No material modifications shall be made to this Consent Decree without written notification to, and written approval of, the United States, Settling Defendant and the Court. Modifications that do not fundamentally alter the basic features of the selected remedy within the meaning of 40 C.F.R. 300.435(c)(2)(B)(ii), may be made by written agreement between EPA and Settling Defendant.

80. Nothing in this Consent Decree shall be deemed to alter the Court's power to enforce, supervise *or* approve modifications to this Consent Decree.

XXVII. Effect of Certification of Completion

81. Upon written notification pursuant to Subparagraph 47 b. of Section XIV (Certification of Completion) of the Del Monte Fresh Produce (Hawaii), Inc. Consent Decree, Settling Defendant shall have no further obligations under this Consent Decree, except as may be required by Section XII (Indemnification), Section XX (Records Retention), and Section XXI (Payment for Response Costs), and each Declaration of Environmental Restrictions shall be cancelled pursuant to its terms, if not cancelled earlier pursuant to its terms.

XXVIII. Lodging and Opportunity for Public Comment

82. This Consent Decree shall be lodged **with** the Court for a period of not less than thirty (30) days for public notice and comment in accordance with Section 122(d)(2) of CERCLA, 42 U.S.C. § 9622(d)(2), and 28 C.F.R. § 50.7. The United States reserves the right to withdraw or withhold its consent if the comments regarding this *Consent Decree* disclose facts or

considerations that indicate that this Consent Decree is inappropriate, improper, or inadequate Settling Defendant consents to the entry of this Consent Decree without further notice.

83. If for any reason the Court should decline to approve this Consent Decree in the form presented, this agreement is voidable at the sole discretion of either Party, in which case the terms of this Consent Decree may not be used as evidence in any litigation between the Parties.

XXIX. Signatories/Service

84. The undersigned representatives of Settling Defendant and the Assistant Attorney General for the Environment and Natural Resources Division of the Department of Justice each certifies that he or she is fully authorized to enter into the terms and conditions of this Consent Decree and to execute and legally bind the Party on whose behalf s/he signs this document.

85. Settling Defendant hereby agrees not to oppose entry of this Consent Decree by this Court or to challenge any provision of this Consent Decree unless the United States has notified Settling Defendant in writing that it no longer supports entry of this Consent Decree.

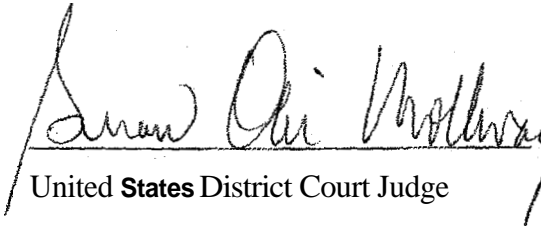
86. Settling Defendant shall identify, on the attached signature page, the name, address, and telephone number of an agent who is authorized to accept service of process by mail on behalf of Settling Defendant with respect to all matters arising under or relating to this Consent Decree. Settling Defendant hereby agrees to accept service in that manner and to waive the formal service requirements set forth in Rule 4 of the Federal Rules of Civil Procedure and any applicable local rules of this Court, including, but not limited to, service of a summons.

XXX. Final Judgment

87. This Consent Decree and its appendices constitute the final, complete, and exclusive agreement and understanding between the Parties with respect to the settlement embodied in this Consent Decree. The Parties acknowledge that there are no representations, agreements or understandings relating to the settlement other than those expressly contained in this Consent Decree

88. Upon approval and entry of this Consent Decree by the Court, this Consent Decree shall constitute a final judgment between the United States and Settling Defendant. The Court finds that there is no **just** reason for delay and therefore enters this judgment as a final judgment under **Fed. R. Civ. P. 54 and 58**.


SO ORDERED THIS 18th DAY OF September, 2007.


United States District Court Judge


THE UNDERSIGNED PARTY enters into this Consent Decree in the matter of United States v. James Campbell Company LLC.

FOR THE UNITED STATES OF AMERICA:

6/8/07
Date


ELLEN MAHAN
Deputy Chief
Environmental Enforcement Section
Environment and Natural Resources Division
U.S. Department of Justice
Washington, D.C. 20530

3/19/07
Date


BRADLEY R. O'BRIEN
Environmental Enforcement Section
Environment and Natural Resources Division
U.S. Department of Justice
301 Howard Street, Suite 1050
San Francisco, California 94105

THE UNDERSIGNED PARTY enters into this Consent Decree in the matter of United States v. James Campbell Company LLC.

FOR EPA:

5/10/07
Date

Keith Takata
KEITH TAKATA
Director, Superfund Division,
Region IX
U.S. Environmental Protection Agency
75 Hawthorne Street
San Francisco, California 94105

Date

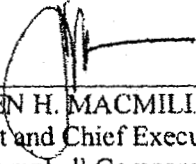
THELMA ESTRADA
Assistant Regional Counsel
U.S. Environmental Protection Agency
Region 9
75 Hawthorne Street
San Francisco, California 94105

THE UNDERSIGNED PARTY enters into this Consent Decree in the matter of United States v. James Campbell Company LLC.

FOR SETTLING DEFENDANT:

JAMES CAMPBELL COMPANY LLC

March 29, 2007
Date



STEPHEN H. MACMILLAN
President and Chief Executive Officer
James Campbell Company LLC
James Campbell Building
1001 Kamokila Blvd.
Kapolei, Hawaii 96707

Agent Authorized to Accept Service on Behalf of **Above-signed** Party:

David H. Franzel, Esq.
James Campbell Company LLC
James Campbell Building
1001 Kamokila Blvd.
Kapolei, Hawaii 96707
Phone: (808) 674-3176

APPENDICES

Appendix A

Declaration of Environmental Restrictions for the Source Area.

Appendix B

Declaration of Environmental Restrictions for the Well Restriction Area.

Appendix C

Declaration of Environmental Restrictions for Access to the Site.

Appendix D

The ROD.

Appendix E

Map of the Site and the Well Restriction Area.

Appendix F

Map of the Source Area.

Appendix G

List of the Estate's Beneficiaries.

Appendix H

List of JCCLLC's Current Shareholders.